

Agency: Corporation for National and Community Service (CNCS)
RIN: 3045-AA69

COMMENTS SUBMITTED BY: Volunteer Maine, the State of Maine service commission

SUMMARY: The Maine state service commission strongly opposes the two most significant proposed changes published in this rulemaking notice. Namely, the requirement that everyone serving in National Service or charged to a grant be required to have a fingerprint-based FBI background check; and, the mandated use of federally contracted vendors.

We also take this opportunity to comment on fundamental flaws CNCS built into its eligibility guidance and how those policies created the level of IPERIA issues cited in this proposed rule's background.

In addition to submitting its own comments, Volunteer Maine fully endorses every aspect of the comments submitted by ASC, America's Service Commissions. In particular, we concur strongly with the comments about the Regulatory Flexibility Act, Executive Order 13132 – Federalism, Unfunded Mandates, and Executive Order 12866. Given the full discussion in the ASC comments, Maine will use its comment opportunity to focus on proposed changes of particular concern and interest to the Commission.

OPENING OF COMMENTS.

Before discussing the points to which we object, the Maine commission would like to make some brief comments on pieces of the proposed rule that we support or advocate there be slight modifications.

§2540.200 – SUPPORT WITH MODIFICATION. Subrecipients of Volunteer Generation Funds, Martin Luther King Day of Service Grants, and September 11th Day of Service Grants should be removed from the list. These subgrants are typically very small (\$500 to \$30,000) and support recruiting community volunteers and supplies for projects. In many cases, grants under the day of service programs would be smaller than the total amount needed to perform background checks!

§2540.201 – SUPPORT WITH CLARIFICATION. Clarify whether there is an expectation that participants and staff associated with fixed amount grants are "individuals in covered positions." These grants do not have budgets for living allowances or salaries but, for participants, do provide education awards. The potential issues around public safety and creating two "classes" of members/staff are not clearly addressed.

§2540.202 – NEUTRAL BUT RAISE A CAUTION. The agency should consider the increasing awareness of the change in the FBI database records that allows them to retain non-criminal fingerprints and other biometric data. The issue of consent should include a notice of whether or not a person's fingerprints will/may be stored. The entity submitting the fingerprints gives the consent to store, presumably based on local law. See privacy impact assessment issued 20 February 2015, "Next Generation Identification (NGI) - Retention and Searching of Noncriminal Justice Fingerprint Submissions," issued by Ernest J. Babcock, Senior Component Official for Privacy, CJIS/FBI.

§2540.203 – SUPPORT. Support encouragement to grantees to refocus their risk management attention from mere compliance with the National Criminal History Record Check requirements to the larger issue of protecting the participants, beneficiaries, and partners in National Service programs.

§2540.205.b. –SUPPORT only this subsection.

§2540.205.c. – DO NOT SUPPORT. The effective date of any rule changes needs to be the date of the next grant award. The CNCS habit of altering terms and conditions in the middle of a grant period must stop. In and of itself, it is a major cause of non-compliance because grantees make adjustments to policies and procedures at the start of grant periods. The recalibrating of policies, procedures,

documentation protocols, and more at not just the program level but legal sponsor level cannot (and should not) be done hastily. Furthermore, requiring current grantees to re-check people within 180 days of the rule taking effect means that, for the second time in 24 months, National Service programs (Senior Corps most notably) would be doing a recheck just 18 months after being required to do the same as part of a compliance exercise.

§2540.207 – DO NOT SUPPORT. The existing language for “(a) Alternative search procedure” needs to be maintained. CNCS has a long history of summarily denying waivers of many types. This issue is too complex and serious to continue that practice. The process for submitting and acting on a waiver request as well as criteria for granting or denying must be outlined. Under the proposed revisions, programs operating in a host of settings (schools, hospitals, jails, courts, law enforcement agencies, youth development agencies) that require Criminal History Record Checks will see the costs for this procedure double (see discussion below).

In addition, grantees using background check systems set up by the State Repositories to conform with FBI guidance on Serve America Act compliance (see reference below to 2011 DOJ memo) and that meet CNCS statutory requirements, should be automatically given waivers of the requirements to use any federally designated vendor should 2540.204 be enacted.

COMMENTS RELATED TO §2540.204.a; §2540.205; §2540.206; AND OTHER MATTERS IN THE FEDERAL REGISTER NOTICE:

For over 25 years, Maine’s service commission has administered National Service grants in Maine including AmeriCorps State, Volunteer Generation, and (for a time) VISTA. Beginning in 2007, the commission supported all Maine National Service – eventually including Senior Corps – in their efforts to comply with the new National Service Criminal History Check requirements. Between 2007 and now, the Commission and some grantees have been part of three FBI audits of the state repository and its handling of results from FBI fingerprint checks. These experiences, along with direct technical assistance from the FBI on how to accomplish compliance, have taught us much including how to use two existing exceptions to the FBI laws to accomplish both compliance with the National Service law and solid risk management in programs.

The requirement for criminal history background checks has become a normal onboarding step for volunteer programs and employers. Each entity – nonprofit, governmental, educational – typically establishes with its risk managers, the events and offenses that would disqualify someone from serving or working in various organizational positions. From 1995 through about 1999, CNCS contracted with the Nonprofit Risk Management Center to provide training and technical assistance on risk management across all National Service programs. CNCS supported grantee work to identify risks, establish methods for assessing risks, and appropriately mitigate/manage/eliminate risk. Full background checks including criminal history were among the tactics programs learned to use. Subsequently, CNCS abandoned a well-reasoned risk management strategy in favor of a non-research based “more penalty=more compliance” model.

When the 2009 requirement to add NSOPW and the other eligibility criteria became law, CNCS abandoned true risk management and redefined it to mean determining whether a candidate for a National Service position was eligible to serve. The risk was no longer about program beneficiaries, partners, or other National Service participants. Instead the risk was defined as program compliance with CNCS-dictated **procedures** for determining eligibility. This new definition created the IPERIA problems and has only been compounded with each successive CNCS effort to establish its reputation as a federal agency that does not make improper payments.

CNCS DOES NOT TIE RECOVERY OF IMPROPER PAYMENTS TO INELIGIBLE RECIPIENTS BUT RATHER, TO ERRORS IN EXECUTION OF THE MANDATED ASSESSMENT TIMELINE.

Improper payments, according to the 2002 law and reaffirmed in the 2012 “improvement act”, are payments that should not have been made or that were made in an incorrect amount, including both overpayments and underpayments. This definition includes ‘payments made to **ineligible recipients**’ (emphasis added), duplicate payments, payments for a good or service not received, and payments that do not account for applicable discounts.’

The National Service Trust Act, in 42 U.S.C. 12645g – Criminal History Checks, stipulates “each entity selecting individuals to serve in a position in which the individuals receive a living allowance, stipend, national service educational award, or salary through a program receiving assistance under the national service laws” shall conduct criminal history check of the individuals.

There are only four (4) results cited in in the law that would make a person ineligible to participate in National Service: refusal to consent to the criminal history check described; makes a false statement in connection with such criminal history check; being registered, or required to be registered, on a State sex offender registry or the National Sex Offender Registry; or has been convicted of murder.

The law specifies that, at a minimum, organizations screening applicants for covered positions must check the National Sex Offender Registry plus criminal history records in the state where the person will serve and, if the person is residing in another state when applying, the state of residence. Because the FBI fingerprint report would cover both states, conducting an FBI criminal history check is permitted as an option. Only when the covered position includes access to vulnerable populations is there a requirement to conduct an FBI fingerprint-based criminal history check, regardless of where the individual lives at the time of application.

The only statement about when the check must be conducted is in administrative law, “45 CFR § 2540.203 When must I conduct a State criminal registry check and a National Sex Offender Public Website check on an individual in a covered position.” It states the dates after which the checks must be conducted on covered positions.

While logic and good risk management dictate the checks would be done as part of selection or onboarding, **NSCHRC improper payment findings have resulted only from CNCS guidance about timeline and documentation of adjudication, NOT findings of participants ineligible to serve.**

Both IPERIA and the NCSTA specifically discuss ineligible recipients/participants. They do NOT discuss as reasons for recovering funds, perceived errors in carrying out eligibility determinations. While those administrative procedures are critical and practice should follow human resource best practice, **improper execution of onboarding procedures for an eligible applicant may not be the basis of a determination that improper payments were made. That is what has been occurring for 9 (nine) years.**

The Maine commission’s 2009-2019 monitoring of programs uncovered 8 instances of late or not properly notated (“adjudicated”) NCHRCs covering **0.2%** (2 hundredths of a percent) **of all covered positions but resulting in IPERIA assessments of \$30,500 by CNCS**. All but two subgrants impacted were awards under \$300,000. **EVERY** individual whose criminal history check was done late or not signed/notated by staff **was eligible to serve** based on the results of the checks.

In July 2019, CNCS compounded this problem by revising the “improper payment recovery” to include all funds associated with late background checks and inadequate documentation of adjudication. The sections noted above will make a bad situation worse.

§2540.204 – change to require a national vendor be the sole provider of National Service Criminal History Record Checks (NSCHRC).

We object in the strongest possible way to mandating the use of a federally selected and contracted vendor.

First, CNCS has demonstrated it is not able to select a contractor whose claims of accessibility are accurate. The current vendor purports to have a presence throughout Maine by listing local law enforcement agencies on its website as available sites. In fact, there are only 4 Fieldprint sites, all in the southern part of the state. Nearly 90% of the state has no Fieldprint presence; purported vendor sites are local or county law enforcement agencies who **were not consulted** but, rather, volunteered. Because of agreements with the state repository, the programming of scanning equipment for law enforcement purposes and not non-criminal background checks, and the option under Maine law to set a local fee to cover any cost of doing a non-criminal background check, the tactic the vendor is using is untenable.

Second, CNCS established a contract with Fieldprint that has the vendor checking more offenses than the federal law and regulations require. On the face, that might be a benefit to grantees and subgrantees were it not for two significant problems:

- A. The list of offenses is deemed proprietary so no one other than the vendor and CNCS know what offenses are considered in making the determination of eligibility to serve. CNCS confirmed the proprietary nature of the list to Commissions and subgrantees in 2019 when it offered the vendor as an option for conducting the checks.

Consequently, when a program receives notice of the vendor's determination (recommendation) based on its review, the program cannot determine whether the recommendation to accept or not is only based on the statutory exclusions or whether the statutory exclusions were absent but some other offense on the list was present.

The latter may or may not be of concern to the local program. Indeed, there are a host of programs that engage people in National Service precisely because their life experience has been difficult, and they can relate in unique ways to people served by the program.

- B. The vendor is constrained by federal law from disseminating the information any further. This is the same constraint that Maine National Service programs have when they directly receive the results of FBI fingerprint checks (rap sheets or nothing found) as qualified entities. If forced to use a federally chosen contractor to conduct the NSCHRCs, National Service program sponsors in Maine would have to incur a second cost and applicants would have to submit a second set of fingerprints so the program staff could execute their local risk management and selection procedures. CNCS is not proposing to cover the cost of a second check by removing background check expenses from the calculation of cost-per-member or participant.

Third, for certain National Service grantees – especially AmeriCorps – with annual enrollment and service timeframes, it is extremely difficult to comply with the DOJ requirements that applicants may not be “denied employment, licensing, [or service] based on information in the record until the applicant has been afforded a reasonable time to correct or complete the record or has declined to do so.” (10/31/2011 memo to all CJIS System Officers and State Bureau of Identification Representatives from K DelGreco, Section Chief, Biometric Services, CJIS/FBI/DOJ, “Serve America Act.”) The vendor may not pass on the contents of the report so the individual has to submit to a second fingerprint request in order to find what is in the report that leads to the recommendation the person not be accepted for service. This can take longer than the first request and resolution even longer. When all is said and done, it is entirely plausible – even likely – the term of service the person applied for is no longer available in AmeriCorps because the time left in the program year is less than the term hours required.

There is a simple remedy that does not require doubling the cost of determining eligibility, conducting NSCHRCs, and applying local qualifications related to criminal history. The remedy

begins with grantees and subgrantees using the National Child Protection Act as amended by the Volunteers for Children Act (NCPA/VCA) 42USC §5119 as the basis for submitting fingerprints to the FBI through their state repositories and becoming entities qualified to receive the results directly. CNCS should pave the way for state commissions working with their SBIs by consulting with the FBI on how to overcome any barriers (e.g., availability of scanners, training for qualified entities). State commissions can work with their SBIs to get the system in place and facilitate both SBI communication with National Service programs and training qualified entity staff assigned the responsibility of considering results (RAP sheets, etc.).

In fact, in the same 31 October 2011 memo from the FBI to state repositories (States' Bureaus of Identification), Section Chief Del Greco outlined how to meet the requirements of the Serve America Act using the exception to FBI laws created in the NCPA/VCA. This instruction became known to a number of state commissions who successfully established this pathway for determining eligibility, conducting the required searches, and applying local qualifications to a candidate's application to serve. Maine was among them and, by 2016, established a system with the Maine SBI that is used by all Maine National Service programs.

By 2016, SBI had contracted with a vendor to digitally collect the fingerprints (scanning) at multiple locations around the state. The fingerprints are submitted digitally to the state repository which submits them to the FBI. Using the proper ORI and digital system reduced the wait time for results from 6-8 weeks to 6-8 days or less.

(Note: Maine's SBI considered Fieldprint but did not select it as the vendor because it had/has virtually no genuine presence in Maine. Its reliance on local and county law enforcement agencies presumes those agencies will accommodate non-criminal requests. Because the state repository has a well dispersed system for digital collection, local LEAs in Maine rarely take on this task, in particular they do not do this for individuals who are not residents in their jurisdiction. And it should be noted that it is the LEAs that will bare the brunt of increased cost if CNCS implements the proposed rule. The cost is not solely personnel but also reprogramming scanners coded to their specific needs so that the applicant's fingerprints are not identified with law enforcement activity. Naturally, the cost will be passed to grantees who are sending service candidates and, given the permission in Maine law for agencies to set their own fee schedules, grantees will be hard pressed to accurately budget for these.)

CNCS could retain the vendor contract for states that need to phase into the NCPA/VCA process and provide additional funding to grantees in those states to cover the cost of conducting a second background check in order to do their own organizational due diligence.

The **remedy continues with modification of the proposed change in §2540.205**. Expecting that "eligibility to serve" be incorporated into the selection process would bring National Service in line with the human resource practices of many nonprofit and public sector employers. However, there should be a provision for a CNCS waiver either directly to a grantee (Senior Corps, AmeriCorps National, etc.) or through a state commission and using the precedent of VISTA pre-service orientation but with a modification. Based on our 8-year experience managing a large VISTA program, VISTA candidates attend pre-service orientation, often without having background checks completed.

The modern waiver we propose would permit grantees include yet-to-be cleared individuals in a program's intensive/extensive initial training/orientation and count the hours as training (retroactively include the hours in the service record) so long as the NSCHRC results were returned and adjudicated before the training concluded. This isn't to suggest that the person would be enrolled until the clearance arrived but does maintain an equity among corps members whose service requires significant training before heading out to the community. Examples of programs that may be expected to use this opportunity include those who train members as recovery coaches, conservation corps that do intense

safety and skill training initially, adult or financial literacy and health programs that do intensive training on how to present curricula to community members.

§2540.205 – revision of procedures so that all candidates for service, even those without access to vulnerable populations, undergo NCHRCs that include NSOPW plus state of residence, state of service, and FBI fingerprint criminal history record checks.

This proposed change is unnecessary, goes beyond the requirements of the law, and shows a lack of understanding of why 42 USC Sec. 189D(b)(2) said a criminal history background check for individuals without access to vulnerable populations would consist of:

- 2)(A) *a search of the State criminal registry or repository in the State in which the program is operating and the State in which the individual resides at the time of application; or**
 (B) *submitting fingerprints to the Federal Bureau of Investigation for a national criminal history background check.*

*emphasis added

We understand the motivation for ignoring the “or” and requiring that every candidate for service submit fingerprints to the FBI for a national check. It eliminates the need to verify identity because biometric data will match to all names (legal, former, alias, etc.) and the FBI checks capture data from all states (and replicates – or verifies, depending on your view – the NSOPW) thus, eliminating the need for state of residence plus state of service.

CNCS wants to be VERY cautious about taking this step since it requires an entire class of citizens – residents applying to serve in their home states – submit biometric data to prove eligibility that they are not required to provide under the law.

§2540.206 – procedural steps required and permission the vendor may “facilitate” documentation

(a)(3) Provide a reasonable opportunity for the person to review and challenge the factual accuracy of a result before action is taken to exclude the person from the position.

To meet this criteria, a grantee or subgrantee will be required to conduct a duplicate NSCHRC because the vendor may not disseminate, under federal law, the results they receive. Automatically, CNCS is doubling the cost of determining eligibility. If the program legal sponsor has not become a qualified entity with their state SBI, the individual will have to request the second check and, given the classification of such checks, it becomes follows a non-urgent timeline that prolongs receipt of the results. As discussed above, it is highly likely this process will become a barrier to service.

(a)(5) Maintain the results of the National Service Criminal History Check components as part of grant records.

This is problematic on multiple levels when a federally contracted vendor is part of the equation.

- 1) the Commission is unable to fulfill it’s monitoring and compliance duties with its grantees when the records are held by a vendor.
- 2) a number of state laws apply to this item including record retention, use of proprietary databases to maintain data for which the state and its vendors have a responsibility, and – for commissions as well as grantees – the definition of what constitutes grant records for the purposes of any sort of audit. The change to add a vendor to this mix is extraordinarily high risk and creates a host of other problems that are likely to be more problematic than the one it seeks to fix. Among the foreseeable problems:
 - a) There is no assurance CNCS will maintain a relationship with a vendor for 10 years or that the vendor will exist, as is, for that duration. In a world of mergers, acquisitions, multi-national

owners, what is the plan for ensuring data is available, secured, and held in compliance with local laws?

- b) Grantees and subgrantees who are held responsible for these processes as well as the documents are not in control of the very items for which they are responsible.
- c) Who owns the data is not clear because the CNCS contract is not public. Did CNCS stipulate that it owns the data or did it set up a system whereby it facilitates the subgrantee owning the data or does the vendor own the data?
- d) What is the data storage capacity of the selected vendor?
- e) Does it comply with the cybersecurity and privacy laws of each state? Is each state protected from liability if database security is breached?
- f) Organizations operating within a single state border cannot expect – and in the case of Maine public entities are not allowed – to let vendors choose which state's laws will apply to situations such as these. In Maine, a vendor providing this type of service must comply with Maine law.

In summary, the sections we have grave concerns about and to which we have strong objections are so problematic as to only compound the problem CNCS seeks to solve. We urge the agency to turn from its long history of making a problem worse and do two things: align IPERIA concerns with actual eligibility; and, rely on the NCPA/VCA option to restore actual risk management and eligibility determination to the community-based grantees. The ultimate option is through amendment to the Serve America Act. An exception similar to NCPA/VCA could be written into the law.